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IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

VS.

WESTERN ALFALFA CORPORATION,

Respondents.

AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
I. INTROUCTION	1
A. THE COURT'S HOLDING	2
B. THE INTEREST OF THE STATES NAMED HEREIN	2-3
C. THE ADVERSE EFFECT OF THE COURT'S DECISION	3-4
II. JURISDICTIONAL GROUNDS	4-5
III. QUESTIONS PRESENTED	5
IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5-7
V. STATEMENT OF THE CASE	7-9
VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	9
A. THE SEARCH WAS NOT UNREASONABLE	9-14
B. THE INSPECTOR HAD PROBABLE CAUSE TO TAKE THE OPACITY READINGS WHICH HE OBSERVED	14-15
C. WESTERN ALFALFA WAS NOT DENIED ITS RIGHTS OF CONFRONTATION BEFORE THE AIR POLLUTION VARIANCE BOARD BECAUSE THE INSPECTOR APPEARED, TESTIFIED, AND WAS SUBJECT TO CROSS-EXAMINATION.	15-17
CONCLUSION	17-18
APPENDIX A—Opinion of the Colorado Court of Appeals dated April 3, 1973	

B—Order of the Supreme Court of the State of Colorado dated June 25, 1973

C—Mandate of the Colorado Court of Appeals dated June 26, 1973

D—Decision of Air Pollution Variance Board entered January 31, 1970

CASES CITED

Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation, Case No. 71-494, 510 P.2d 907 (1973) 1, 7

California v. Green, 399 U.S. 149 (1970) 17

Camar v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) 9, 14

City of Seatte, 387 U.S. 541, 87 S.Ct. 1727, 18 L.Ed. 930 ..... 11, 14

Fry Roofing Company v. State Department of Health et al., —— Colo. ——, 499 P.2d 1176 (1972) 9

Fullbright v. United States, 392 F.2d 432 (1968) 10

Goldberg v. Kelly, 397 U.S. 254 (1970) 16

Greene v. McElroy, 360 U.S. 474 (1959) 16

Hester v. United States, 265 U.S. 57 (1924) 9

Jenkins v. McKeithen, 395 U.S. 411 (1969) 17

Katz v. United States, 389 U.S. 347 (1967) 10, 11, 12

Mancusi v. Deforte, 392 U.S. 364 (1968) 12

Nelson v. O'Neil, 402 U.S. 622 (1971) 17

United States v. Biswell, 406 U.S. 311, 92 S.Ct. ——, 32 L.Ed.2d 87 (1972) 13

United States v. Capps, 435 F.2d 637 (9th Cir. 1970).. 11

United States v. Litvin, 353 F.Supp. 1333 (D.D.C. 1973) 15

United States v. Morton Salt Company, 338 U.S. 632 (1950) 13

United States v. Schafer, 461 F.2d 856 (9th Cir. 1972) 17

Willner v. Committee on Caracter and Fitness, 373 U.S. 96 (1963) 14

STATUTES CITED

C.R.S. 1963, 66-29-5 (1967 Perm. Cum. Supp.) 7
66-29-5(2) and (15) (1967 Perm. Cum. Supp.) 15
66-29-8 (1969 Perm. Cum. Supp.) 6
66-29-12 (1967 Perm. Cum. Supp.) 17

OTHER AUTHORITIES

Air Pollution Control Act of the State of Colorado 6

Federal Clean Air Act, 42 U.S.C.
Section 1857 (Section 114 of the Act) 6
Section 101 (a) (3) 2
Section 111 (c) (13) 3
Section112 (d) (1) 3
Section 114 (a) (2) 3

Fourth Amendment to the United States Constitution
Title 28, U.S. Code, Section 1257 ..... 5, 9, 10

Sixth Amendment to the United States Constitution.. 16

Fourteenth Amendment to the United States Constitution 6, 16

I. INTRODUCTION

The States appearing as signatories here on this amicus curiae brief respectfuly request this Court to issue its writ of certiorari to review the judgment and opinion of the Colorado Court of Appeals in the case of *Air Pollution Variance Board of the State of Colorado vs. Western Alfalfa Corporation* Case No. 71-494, 510 P.2d 907 (1973). Petition for certiorari was denied by the Supreme Court of Colorado on June 25, 1973. The petition for writ of certiorari was filed with this Court on or about October 23, 1973 by the Attorney General of the State of Colorado.

A. THE COURT'S HOLDING

The Colorado Court of Appeals held that a field inspector of the State Department of Health (Division) conducted an unreasonable search in violation of the Fourth Amendment of the United States Constitution when, under specific statutory authorization, he entered upon the premises of an industrial plant, without notification to company personnel, for the purpose of testing for compliance with air pollution control laws by recording visible readings of smoke plumes which were being discharged into the atmosphere. The Court further held that a commercial enterprise which was not notified that tests and measurements were being made for the purpose of determining compliance, so that it could have an observer present, were denied the effective exercise of its rights of confrontation at the hearing before the Variance Board.

B. THE INTEREST OF THE STATES NAMED HEREIN

The states named herein have statutory inspection schemes for the enforcement of air pollution laws similar to those existing in the State of Colorado. If the decision of the Colorado Court of Appeals is allowed to stand, it would place significant restrictions upon the ability of the States to carry out the inspection, monitoring, and testing procedures of the various Air Pollution Control Acts in the respective States, resulting in a diminution of the deterrent and control functions of said Acts.

Section 101(a)(3) of the Clean Air Act passed by Congress contains a congressional finding that:

> The prevention and control of air pollution at its source is the primary responsibility of States and local governments.

Each State is required to submit for the Administrator's approval implementation plans which are adequate to attain and maintain the national primary and secondary ambient air quality standards.

Primary standards are those which are requisite to protect the public health. Secondary standards are those necessary to protect the public welfare.

The State implementation plans must contain adequate testing, monitoring, and enforcement procedures before the Administrator may enforce the provisions of an approved State implementation plan, but the Act envisions that the State will enforce its own laws and regulations without the necessity of federally-assumed enforcement. Besides developing plans for bringing existing emission forces into compliance, the States may design procedures for controlling emissions from new stationary sources and sources which emit hazardous air pollutants. If these procedures are deemed adequate, the Administrator is authorized to delegate to the State any enforcement authority he has under the Act (Section 111 (c) (13); Section 112 (d) (1)).

A foremost enforcement tool which the Act confers on the Administrator or his authorized representative is the Section 114(a)(2) right of entry onto any premises on which an emission source is located so that he may sample emissions, inspect monitoring equipment or methods, or copy records in order to ascertain compliance with federal clean air standards or the provisions of federally-approved State implementation plans.

C. THE ADVERSE EFFECT OF THE COURT'S DECISION

The decision of the Colorado Court of Appeals re-

quires the responsible State agencies to obtain search warrants before the premises can be entered without consent. In addition, the decision requires that the State inspector notify the owner or operator of an emission source when testing for compliance, even when the inspector does not enter the premises.

In holding that the company's rights of confrontation are denied unless it is provided the opportunity to have an observer at the scene of the test, the Colorado Court has abrogated the federal and state statutory right of entry and has undermined the deterrent effect of an unannounced inspection. Moreover, the rationale of this holding requires that all administrative agencies, whatever their function, assure that the subject of an investigation has the opportuniy to be present or have an observer present whenever a test is conducted or evidence is gathered for the purpose of ascertaining compliance with standards designed to protect the public health or welfare. Such a requirement would greatly impair the effectiveness of a control agency.

II. JURISDICTIONAL GROUNDS

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The decision of the Colorado Court of Appeals was based solely and entirely upon the Fourth and Fourteenth Amendments of the Constitution of the United States.

The Colorado Court of Appeals rendered its decision on April 3, 1973, a copy of which decision is attached as Appendix A. A Petition for Rehearing was timely filed and denied by the Colorado Court of Appeals in April 24, 1973. A Petition for Writ of Certiorari was timely

filed with the Supreme Court of Colorado and was denied by that Court on June 25, 1973, a copy of said order is attached hereto as Appendix B. Mandate was issued by the Colorado Court of Appeals by order dated June 26, 1973, a copy of which is attached hereto as Appendix C. The decision of the Air Pollution Variance Board, dated January 31, 1970, is attached hereto as Appendix D.

III. QUESTIONS PRESENTED

1. Does a field inspector for a State Department of Health conduct an unreasonable search in violation of the Fourth Amendment when, pursuant to specific statutory authority, he enters upon commercial premises and, without notification to plant operators, takes visual readings of a smoke plume being discharged into the atmosphere, for the purpose of ascertaining compliance with State air pollution laws?

2. Is the owner or operator of an emission source denied his Fourteenth Amendment rights of confrontation before an air pollution board if he is not provided the opportunity to have an observer present when tests or measurements are made for the purpose of ascertaining compliance with air pollution laws?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> [n] or shall any state deprive any person of life, liberty, or property without due process of law, . . .

3. Colorado Revised Statutes, 1963, Section 66-29-8, (1967 Perm. Cum. Supp.) provided in pertinent part that:

> In addition to authorities specified elsewhere in this Act, the Division shall have the power to:
>
> (d) **enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or non-compliance with any emission standard or any order under this Article.** Any information relating to secret process, or methods of manufacture, or production obtained in the course of inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination. (Emphasis supplied.)

The Clean Air Act, 42 U.S.C. Section 1857c-9 (Section 114 of the Act) provides in pertinent part that:

> Section 114(a) for the purpose (i) of developing or assisting in the development of any implementation plan under Section 110 or 111(d), any standard of performance under Section 111, or any emission standard under Section 112; (ii) **of determining whether any person is in violation of any such standard or any requirement of such a plan,** or (iii) carrying out Section 303—
>
> (1) The Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such locations, at such intervals, and in such manner as the Administrator shall prescribe, and (E) provide such other information as he may reasonably require: and
>
> **(2) The Administrator or his authorized representative, upon presentation of his credentials—**

(A) shall have the right of entry to, upon, or through any premises in which an emission source is located or in which the records required to be maintained under Paragraph (1) of this Section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under Paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under Paragraph (1).

(b) (1) Each state may develop and submit to the Administrator a procedure for carrying out this Section in such state. If the Administrator finds a state procedure is adequate, he may delegate such state any authority he has to carry out this Section (except with respect to new sources owned or operated by the United States). (Emphasis supplied.)

V. STATEMENT OF THE CASE

On June 4, 1969, a field inspector for the Colorado Department of Health (Division) entered the premises of three Western Alfalfa Corporation plants in the course of making visual observations of emissions being discharged from the plant's operation. Representatives of the Department of Health had been engaged in conference and conciliation with officials of the Western Alfalfa Corporation since September of 1967 in regard to air pollution violations (See Variance Board Decision). Colorado law in effect on June 4, 1969 prohibited emissions which were in excess of a Number 2 Ringelmann, or 40% equivalent opacity, discharging for longer than three continuous minutes. 1967 Perm. Cum. Supp., C.R.S. 1963, 66-29-5.

The statutory prescribed test, which is called a Ringelmann or opacity reading, is made by standing in a position where the inspector has an unobstructed view of the emission. He then makes a visual observation of the emission and rates it according to the opacity scale of the Ringelmann chart. Inspectors are specially trained in a state-certified school to read and rate the various de-

grees of emission opacity. The opacity of the emission has a proven correlation to the particulate matter being carried in the emission (Variance Board Transcript Pages 14-15, and 27-29).

The inspector who entered the three Western Alfalfa Corporation plant premises in the course of taking his readings observed the emissions from each source for at least a period of ten minutes. His readings of the emissions were as follows:

1. Windsor Plant
   Dryer — 90% opacity
   Grinder — 70% opacity
   Pelletizer — 50% opacity.
2. Eaton Plant
   Dryer — 85% opacity
   Grinder — 70% opacity
   Pelletizer — 50% opacity.
3. Berthoud Plant
   Dryer — 90% opacity
   Grinder — 50% opacity
   Pelletizer — 40% opacity.

The inspector did not inform plant officials that he was making these observations (Variance Board Transcript Pages 12-15).

The company was issued a cease-and-desist order by the Colorado Department of Health (Division) on June 17, 1969 and on January 31, 1970, the Air Pollution Variance Board, after hearing the testimony of the field inspector and Western Alfalfa witnesses, found the company in violation of the State Air Pollution Control Act and affirmed the cease-and-desist order which had been issued by the Colorado Department of Health. The Dis-

trict Court for Weld County held that the use of the Ringelmann test denied the company due process. The Colorado Court of Appeals held that the test was *constitutional* based on a Colorado Supreme Court decision directly on point (*Fry Roofing Company vs. State Department of Health et al,* ..... Colo. ..... 499 P.2d 1176 (1972) but also held that the inspector had conducted an unreasonable search because he did not have a warrant or obtain the consent of the plant officials to enter the plant premises. The Colorado Court of Appeals relied on *Camara vs. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1737, 18 L. Ed. 2d 943 (1967). The Colorado Supreme Court denied the Petition for Writ of Certiorari to review the Court of Appeals decision.

VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. THE SEARCH WAS NOT UNREASONABLE

1. *The emissions being emitted from Western Alfalfa Corporation's operation were in plain view for anyone who looked to see.*

The Fourth Amendment prohibits unreasonable searches or seizures. Even if the inspector's observations of a highly visible emission can be termed a search in that the inspector was standing on company-owned land, it was not an unreasonable search. In *Hester v. United States,* 265 U.S. 57 (1924), the Supreme Court held that where a defendant's own acts disclosed something illegal, there is no search or seizure. The issue in the *Hester* case involved the observation of illegal acts and the "open fields" doctrine. Although the open fields doctrine does not apply directly to this case, in that the emis-

sions were not contained on the ground but spread through the air, a fortiori, if one is not protected by the Fourth Amendment from observation of acts not contained within the curtilage of one's own property, one cannot be protected by the Fourth Amendment from observations of phenomena which fill the air and spread outside the boundaries of ones own property.

In *Katz v. United States*, 389 U.S. 347, 351 (1967), this Court explained that the Fourth Amendment protects people, not places. In particular the Amendment fosters the reasonable expectation of privacy. However, that which is exhibited to the public may not be constitutionally protected:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

There is nothing so public as a heavy stream of visible emissions issuing from an industrial plant into the surrounding air. Western Alfalfa could not have a reasonable expectation of privacy in what it was discharging.

In *Fullbright v. United States*, 392 F.2d 432 (1968), the Court held at Page 434 that:

> Observations from outside the curtilage, of acts within, are not generally interdicted by the Constitution. Indeed, to so hold might require passing officers to close their eyes to the commission of felonies on front doorsteps.

In the *Western* case, there was blatant exposure to the public and not even a semblance of a private act within the curtilage of Western's Alfalfa's property.

2. *The inspector's intrusion was minimal because he was in an open area accessible to the public.*

Because the inspector was making a visual reading

of opacity, he was required to stand in an open area where he could obtain an unobstructed view of the emissions being emitted on Western Alfalfa's property. The inspector did not enter any of the industrial or office buildings because there was no occasion to do so. Anyone who was walking on the plant grounds or looking in his direction through a window could have seen the inspector looking at the emissions. Commercial enterprises are afforded Fourth Amendment protection as set out in *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1727, 18 L.Ed. 930. However, as the *Katz* decision, *supra* emphasizes, the question is not whether private premises are entered without consent or a warrant, but whether the government unreasonably intrudes upon a legitimately-founded expectation of privacy. A commercial enterprise which is not fenced in with a gate at its entrance holds itself open to any member of the public driving or walking onto its grounds, and, in fact, it usually expects and invites such entry during hours when its plant is operating. The fact that no personnel of Western Alfalfa learned that the inspector was an inspector for the Public Health Department attests to the public accessibility of the outside grounds of the various plants, not to any furtive conduct on the inspector's part.

Even where investigators in the course of a criminal investigation to enter upon a privately-owned residential driveway or open area, the search is not unreasonable as to objects in plain view. *United States v. Capps,* 435 F.2d 637 at Page 640 (9th Cir. 1970):

> The Fourth Amendment's protections do not extend to the "open field" area surrounding a dwelling and the immediate adjacent curtilage, and therefore, information gained as a result of a civil trespass on an "open field" area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information.

The Colorado Court of Appeals decision appears to equate the Fourth Amendment with the civil trespass statute. The Court in effect made a determination that the inspector had trespassed on company property. To the contrary, his entry was specifically authorized by State statute and, secondly, the grounds were generally accessible to the public. In sum, the guideline of *Katz, supra* is directly in point when the Court said:

> There must be a reasonable expectation of free dom from governmental intrusion.

See also *Mancusi v. Deforte* 392 U.S. 364 (1968).

3. *The inspector's entry was pursuant to reasonable regulatory design of State statute.*

Industrial air pollution is a serious threat to the public health and welfare. Any entity or individual who undertakes to profit from public trade must expect reasonable control measures when its profit-making activities may affect the health of the community. This Court has long articulated this policy. Mr. Justice Jackson, authoring the Court's decision in *United States v. Morton Salt Company* 338 U.S. 632 at Page 652 (1950) said that:

> While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the requests for information in this case as caused by nothing more than official necessity, nevertheless, law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Colorado chose to protect its citizens against the ill

effects of air pollution by passing its Air Pollution Control Act. An important part of the legislation was the right of entry onto private premises for the purpose of conducting tests for harmful air contaminants. The standards were stringent; and, due to the variable and constantly fluctuating nature of emissions into the atmosphere, unannounced and immediate testing, and entry for testing, were deemed to be the most effective investigative and control tools. By design or by chance, the smoke or other emissions may change while the inspector seeks and obtains a warrant.

The Colorado legislation was reasonably designed to achieve the purpose of obtaining clean air for the citizens of the State. Entry for testing would be made only during operating hours since emissions were the subject of concern. The statute requires that the owner or operator of the source be notified immediately of the results of tests when air samples were taken. The Act insured that the inspector would enter only for purposes connected with controlling harmful contaminants which are vented into the surrounding air.

In *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. ..... 32 L. Ed. 2d 87 (1972), this Court held that regulatory inspections which further urgent governmental interests may proceed without a warrant or consent where specifically authorized by statute and when the possibilities of abuse and the threat to privacy are not of impressive dimensions. The deterrent effect of unannounced inspections and the importance of immediate action in time, given the shifting nature of the subject matter being regulated, was important to the *Biswell* holding in the context of the Federal Gun Control Laws. See also *United States v. Shafer,* 461 F.2d 856 (9th Cir.

1972) (Agricultural inspection), *United States v. Litvin,* 353 F.Supp. 1333, at Page 1336 (D.D.C. 1973) (Food and Drug inspection). What holds for the Federal government should also hold for the states, especially in the field of air pollution controls where the Congress has actively promoted primary state control over the sources of harmful contamination. The State should not be placed in an inferior enforcement position where an observed violation becomes another stall for a polluter because Health Department personnel must go for a warrant because consent is, or may be, refused.

B. THE INSPECTOR HAD PROBABLE CAUSE TO TAKE THE OPACITY READINGS WHICH HE OBSERVED.

The elements of probable cause in any particular situation vary according to the nature of the inspection and the surrounding circumstances. A regulatory inspection requires a lesser degree of probable cause than a criminal investigation. *See v. City of Seattle, supra.* The primary purpose of the regulatory inspection is to control the harmful activity rather than to prosecute persons for violations. However, when the need for inspection is not of immediate importance, due to the nature of the regulated object or activity, the regulatory body must proceed through the warrant procedures. *Camara v. Municipal Court, supra.* On balance in that situation, the individual or entity's right of privacy exceeds the public interest. The balance swings the other way when the effect on public health, as with air contamination, is immediate.

When the Colorado inspector came within view of the Western Alfalfa plants and saw the heavy plumes of emission blowing in the air, he had probable cause to enter

the premises and make his observations without consent or a warrant before the emissions dissipated.

C. WESTERN ALFALFA WAS NOT DENIED ITS RIGHTS OF CONFRONTATION BEFORE THE AIR POLLUTION VARIANCE BOARD BECAUSE THE INSPECTOR APPEARED, TESTIFIED, AND WAS SUBJECT TO CROSS-EXAMINATION.

The inspector who made the Ringelmann and opacity observations appeared and testified at the hearing before the Air Pollution Variance Board. He was subject to cross-examination concerning his observations, the manner in which he conducted the readings, and their results. The company presented evidence to show that it was not and could not have been in violation on that particular day. Nevertheless, the Colorado Court of Appeals held that Western Alfalfa could not "effectively" exercise its rights of confrontation because it did not have opportunity to have an observor present. The Court's rationale was as follows:

> Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did nit have any knowledge of the nature of emissions on the date in question.

The cornerstone of this reasoning, that the company did not have knowledge of its emissions for reasons ascribable to the inspector's conduct is fallacious. An emission source is required by law to be in constant compliance unless under a State-approved variance 1967 Perm. Cum. Supp., C.R.S. 1963, Section 66-29-5(2) and (15), which this emission was not. Moreover, opaque emissions are as visible to company personnel as they are to the general public and to the State's investigator. The only way a company can stay in continuous compliance with the Pollution Control laws is to constantly monitor

its own emissions. If Western Alfalfa had done so on the particular date in question, it could have rebutted the inspector's testimony. The weakness of Western's evidence cannot be laid to the fault of the inspector. An error in courtesy or an oversight by the inspector in not announcing his presence does not rise to the dimensions of the denial of fundamental due process where the inspector appears, testifies and is subject to cross-examination, and the company is permitted to produce its own testimony, whatever strengths or weakness such testimony and evidence might have.

The effect of the Colorado Court of Appeals' decision is to require every regulatory agency to afford industry the opportunity to have an observer on hand whenever tests which may become evidence in administrative proceeding are made. This requirement far exceeds the protections afforded by even the *Sixth Amendment* to a defendant in a *criminal proceeding.*

The right to confrontation and cross-examination in an *administrative proceeding* which may have significant impact upon a person's financial or property interests is preserved by the *Fourteenth Amendment. Goldberg v. Kelley,* 397 U.S. 254 at Page 269 (1970). In *Greene v. McElroy,* 360 U.S. 474 at Page 496 (1959), this Court articulated the elements of this right when it stated:

(1) The evidence used to prove the government's case must be disclosed to the individuals so that he had an opportunity to show that it is untrue, and

(2) When the perceptions and prejudices of an individual may be involved that person must be subject to confrontation and cross-examination.

The requirement is one of procedural due process meant to protect against substantial deprivation resulting from a decision on ex parte evidence. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, Pages 103-105 (1963). See also *California v. Green,* 399 U.S. 149, at Pages 157-158 (1970). The "confrontation" which is guaranteed is confrontation of the witness under oath at a trial or hearing. *Nelson v. O'Neil,* 402 U.S. 622 at Page 626 (1971).

In *Jenkins v. McKeithen,* 395 U.S. 411 at Pages 428-429 (1969) the court condemned administrative proceedings, which, while they could conclude with a finding of violation carrying criminal sanctions, did not provide the oportunity for the affected person to present witnesses and cross examine government witnesses. The Colorado Pollution Control Act carefully preserved these rights to an enterprise which was issued a cease-and-desist order (See 1967 Perm. Cum. Supp., C.R.S. 1963 Session 66-29-12) and the hearings before the Air Pollution Variance Board in this case suffered none of the defects pointed out in *Jenkins, supra.*

The weight of the evidence was for the Board to determine. The fact that Western encountered a difficult time rebutting the State's expert does not amount to a denial of fundamental due process. Individuals who are the subject of an investigation, whether regulatory, civil or criminal in nature, do not have a constitutional right to be present when evidence is gathered or expert testimony prepared against them.

CONCLUSION

The undersigned States respectfully submit that the Colorado Court of Appeals erred in its view of the Fourth

and Fourteenth Amendments of the United States Constitution as applied to this case. The Health Department inspector did not act unreasonably by entering the grounds of an industrial plant, which he had a right to do by statute, for the purpose of recording visual observations of emissions being discharged in plain view into the atmosphere. Controlling air pollution is an urgent State and Federal interest, and whatever minimal intrusion may have been involved in the inspection did not threaten a legitimately-founded expectation of privacy. Secondly, Western Alfalfa was afforded its rights of confrontation in the hearings before the Variance Board since the inspector was on the stand for cross-examination so that his perceptions, observations, veracity and technical expertise could be tested by Western's attorneys. It is respectfully submitted that this Court should issue its Writ of Certiorari to review the judgment of the Colorado Court of Appeals.

Respectfully submitted.

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APPENDIX A

COLORADO COURT OF APPEALS

NO. 71-494

COURT OF APPEALS
STATE OF COLORADO

Opinion filed and judgment entered on the 3rd day of April, 1973. John Clarence Seifert, Clerk of the Court.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Respondent-Appellant.

Appeal from District Court, Weld County
Honorable Donald A. Carpenter, Judge

DIVISION II JUDGMENT AFFIRMED

Silverstein, C.J., Dwyer and Pierce, JJ.

Linde, Thomson, Van Dyke, Fairchild & Langworthy, George D. Blackwood, Kansas City, Missouri; Houtchens, Houtchens & Dooley, S. Robert Houtchens, Greeley, Colorado; Lee, Bryans, Kelly & Stansfield, Donald D. Cawelti, Denver, Colorado; Attorneys for the Petitioner-Appellee.

Duke W. Dunbar, Attorney General; William Tucker, Assistant Attorney General, Denver, Colorado; Attorneys for the Respondent-Appellant.

Opinion by JUDGE PIERCE.

Appendix A-2

On June 16, 1969, Western Alfalfa Corporation received a cease and desist order from the Division of Administration of the Colorado Department of Health (Division) advising them that the emissions from three of their plants in Northern Colorado were not in compliance with the Air Pollution Control Act (Act), and ordering them, pursuant to the provisions of 1967 Perm. Supp., C.R.S. 1963, 66-29-10(3), to cease and desist from any further violations of the Act. Within ten days from receipt of the cease and desist order, Western filed with the Air Pollution Variance Board (Board) a denial that it was in violation of the Act.

The Board held a hearing in September of 1969. At this hearing, a witness for the State testified that he had made observations on the premises of Western on June 4, 1969, from which he concluded that Western was in violation of the Act. The readings taken purportedly registered darker in shade than a No. 2 on the Ringlemann chart, contrary to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-5.

The Ringlemann chart is an instrument, assigning numerical values to various gradations of smoke color as they appear on the chart. A party using the chart matches the color and density of the alleged smoke pollutant under observation with the numbered example on the chart. This test is sanctioned by the Act as the minimum valid method of determining whether or not the Act is being violated, and is presumptively valid. *Fray Roofing Co. v. State Department of Health,* _____ Colo. _____, 499 P.2d 1176. This method of measuring air pollution is generally sanctioned. *See City of Portland v. Fry Roofing Co.*, 3 Ore. App. 352, 472 P.2d 826 for a collection of cases approving the Ringelmann chart.

Western countered this evidence with Ringelmann readings taken approximately one year earlier by a consulting engineer hired by Western, which showed no violation. They also offered the results of a sophisticated test conducted at their plant by an independent engineering firm some months after they were issued the cease and desist order. Western contends that this test established that they were not in violation of the Act.

The Board concluded that Western's operations were in violation of the Act. It further determined that it would not accept the report of the independent engineering firm because the method of testing was not acceptable to the Division as required by the statute. 1969 Perm. Supp., C.R.S. 1963, 66-29-5(2)(e).

Thereafter, Western filed suit in the district court pursuant to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-13, seeking to have the cease and desist order set aside as not being in compliance with the law. The trial court reversed the Board. We affirm the conclusion and judgment of the trial court.

The Act, as it then existed,[1] established the approach that the Division was to use in searching out and stopping violations. Specially, the Division had the duty to determine, by means of field studies and air samples, the ambient air standard in any area in the state. 1967 Perm. Supp., C.R.S. 1963, 66-29-8. This included the authority to enter and inspect any property for the purpose of investigating either an actual or a suspected source of air pollution. 1967 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

[1] The statute presented to us for construction has been repealed in its entirety, and re-enacted as the Air Pollution Control Act. 1971 Perm. Supp., C.R.S. 1963, 66-31-1 et seq. The new Act has been upheld from a constitutional attack in Fry Roofing Co. v. State Department of Health, _____ Colo. _____, 499 P.2d 1176.

In the instant case, the evidence that resulted in issuance of the cease and desist order was gathered by a field inspector from the Division, who entered the premises of Western on June 4, 1969, without the knowledge or consent of anyone from Western, and made his readings. It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence.

We conclude that the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search. *Camara v. Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930; *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L. Ed. 2d 943. In *Camara,* the Supreme Court made it clear that searches by administrative agencies must be reasonable and must either be based upon the consent of the person who owns the premises, or must be pursuant to a warrant. It was further made clear that this rule is not confined to criminal prosecutions. On the facts of this case, it was necessary for the field investigator to comply with this requirement. We note that this provision was added to the Act by an amendment subsequent to the events in question. 1969 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question.

This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made.

Had Western known of the field observer being on its premises on the date of the investigation, it would have had a reasonable opportunity to effectively exercise its rights of confrontation at the hearing before the Board. 1969 Perm. Supp., C.R.S. 1963, 3-16-4. Imposition of the *Camara* rule assures fundamental fairness in this type of situation. The failure to provide this protection resulted in a violation, in this case, of the Fourth Amendment to the United States Constitution.

Judgment affirmed.
CHIEF JUDGE SILVERSTEIN and
JUDGE DWYER CONCUR.

APPENDIX B

SUPREME COURT

Clerk's Office, State of Colorado, Denver 80203

Case No. C-382

June 25, 1973

71-494

Air Pollution Variance Board

v.

Western Alfalfa Corp.

Copy of an order entered in the above numbered and titled case June 25, 1973, is enclosed.

Your very truly,
RICHARD D. TURELLI, Clerk
By Judi Malora, Deputy

cc:

Mr. John Seifert, Clerk, Colorado Court of Appeals, 607 State Social Services Bldg., Denver, Co. 80203

Honorable John P. Moore, Attorney General, Mr. Wliliam Tucker, Assistant Attorney General, State Capitol, Denver, Co. 80203

Lee, Bryans, Kelly & Stansfiedl, Suite 990, 550 15th St., Denver, Co. 80202

Linde, Thomson, Van Dyke, Fairchild & Langworthy, Columbia Union National Bank Bldg., 900 Walnut St., Kansas City, Missouri 64106

Houtchens, Houtchens & Dooley, 1007 9th Ave., Greeley, Co. 80631

Appendix B-2

IN THE SUPREME COURT OF THE
STATE OF COLORADO

Case No. C-382

April Term, 1973

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.
June 25, 1973

By the Supreme Court
Sitting En Banc

SUPREME COURT
State of Colorado

Certified to be a full, true and correct copy
June 25, 1973

Court Seal

RICHARD D. TURELLI,
Clerk of the Supreme Court
By Judi Malora,
Deputy Clerk

APPENDIX C

COURT OF APPEALS

State of Colorado, 1575 Sherman Street

Denver, Colorado 80203 (303) 892-2641

OPINION OF THE COLORADO COURT OF APPEALS ANNOUNCED AND JUDGMENT ENTERED, April 3, 1973.

Oral Arguments held, January 30, 1973.
Before Harry S. Silverstein, Jr., Chief Judge, William F. Dwyer and Charles D. Pierce, Judges.

MANDATE

No. 71-494

Tr. Ct. No. 19974

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Respondent-Appellant.

This cause came on to be heard on the record on appeal from the District Court of the County of Weld, and was argued by counsel, on consideration whereof, it is

ordered that the judgment of said Court is AFFIRMED.

JOHN CLARENCE SEIFERT,
Clerk of the Court.
ANNA MAE TOMSIC,
Deputy

Court Seal

COURT OF APPEALS
STATE OF COLORADO

Certified to be a full, true and correct copy

Date June 26, 1973

John Clarence Seifert, Clerk of Court of Appeals
By Anna Mae Tomsic, Deputy Clerk

APPENDIX D

BEFORE AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO

IN THE MATTER OF THE REQUEST OF WESTERN ALFALFA CORPORATION FOR A VARIANCE FROM THE EMISSION STANDARDS OF THE AIR POLLUTION CONTROL ACT OF 1966, AS AMENDED.	FINDINGS THE FACT, CONCLUSIONS OF LAW, AND DECISION.

THE MATTER of the request of the Western Alfalfa Corporation (hereinafter referred to as the Petitioner), for a variance from the emission standards of the Air Pollution Control Act of 1966, as amended, at its alfalfa dehydrating plants located at or near the towns of Eaton, Windsor, and Berthoud, Colorado, came on for hearing before the Air Pollution Variance Board of the State of Colorado, in Room 412, Colorado Department of Health Building, 4210 East 11th Avenue, Denver, Colorado, at 2:30 o'clock p.m., on September 11, 1969, and at 1:30 o'clock p.m., on October 16, 1969. At the hearing on September 11, 1969, David Foster, Esquire, was present and represented the Colorado Health Department and the Board, and Mr. George D. Blackwood, Jr., Attorney at Law, Union National Bank Building, 900 Walnut Street, Kansas City, Missouri 64106, and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, were present and represented the Petitioner. At the hearing on October 16, 1969 Mr. James Kreutz, Assistant Attorney General of

the State of Colorado, was present and represented the Board; David Foster, Esquire, was present and represented the Colorado Health Department; and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, was present and represented the Petitioner. From the evidence and matters submitted at the hearings, the Board finds as follows:

FINDINGS OF FACT

1. That the Petitioner's operations are in violation of the emission standards of the Air Pollution Control Act of 1966, as set out in Section 66-29-5, C.R.S. 1963 (1967 Perm. Cum. Supp.).

2. That Ringelmann and Opacity readings for a period in excess of three minutes were taken by personnel of the Colorado Department of Health on June 4, 1969, and all of such readings were in excess of a Ringelmann 2 and an Opacity of 40%.

3. That representatives of the Division have been in conference and conciliation with the Petitioner in regard to its air pollution violations since September, 1967.

4. That Petitioner was issued a Cease and Desist Order on June 16, 1969.

5. That Petitioner requested a hearing before this Board to determine if its operations were in violation of the emission standards set out above and if that finding was in the affirmative, for a variance from said standards.

6. That Petitioner performed a test pursuant to

Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, but the Board finds that Petitioner did not comply with the statute in performing said test in that (a) the method of testing was not acceptable to the Division, and (b) the Division did not determine that it was a reasonable correlation between the standards set forth in subsections (2) and (3) when applied to the Petitioner's emissions.

7. That Petitioner does not have a permit or variance from this Board, the Division, or any local authority to conduct its operations, in violation of the Air Pollution Control Act of 1966, as amended.

8. That there are commercial businesses and residences within 10 block of Petitioner's Windsor Plant operations, ½ mile of Petitioner's Eaton Plant operations, and ¼ mile of Petitioner's Berthoud Plant operations.

9. That Petitioner's operations are within an air pollution area properly designated by the Division, pursuant to the Air Pollution Control Act of 1966, as amended.

CONCLUSIONS OF LAW

1. The Board finds as a matter of law that the Petitioner did not conduct the testing of its emissions in compliance with Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, and that "reasonable correlation" means approximate equivalency.

2. The Board finds as a matter of law that Petitioner's emissions are of an opacity darker in shade than that permitted by law.

3. The Air Pollution Variance Board is granted authority under the Air Pollution Control Act of 1966, as amended, as set out in Sections 66-29-10 and 11, C.R.S. 1963 (1967 Perm. Cum. Supp.), to hold hearings and grant variances.

4. The Board finds that the legislative declaration set out in Section 66-29-2, C.R.S. 1963 (1967 Perm. Cum. Supp.), would not be complied with if the Petitioner were granted a variance.

DECISION

WHEREFORE, it is the decision of the Air Pollution Variance Board of the State of Colorado that the Petitioner's operations are in violation of the emission standards of the Air Pollution Control of 1966, as amended, and that Petitioner be and hereby is denied a variance from said emission standards.

This is a final order of the Air Pollution Variance Board and is subject to judicial review as set out in Section 66-29-13, C.R.S. 1963 (1967 Perm. Cum. Supp.).

DONE this 31 day of January, 1970.

AIR POLLUTION VARIANCE
BOARD OF THE STATE
OF COLORADO
By GEORGE J. DWIRE,
Chairman